No. _____

In the Supreme Court of the United States

MITCH CARMICHAEL, President of the West Virginia Senate, DONNA J. BOLEY, President Pro Tempore of the West Virginia Senate, TOM TAKUBO, West Virginia Senate Majority Leader, LEE CASSIS, Clerk of the West Virginia Senate, and the WEST VIRGINIA SENATE,
Petitioners,

v.

West Virginia ex. rel. MARGARET L. WORKMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a decision that brought pending state impeachment proceedings to a halt, a panel of acting justices of the Supreme Court of Appeals of West Virginia inserted itself into both the substance and procedure of a process that the West Virginia Constitution entrusts exclusively to the Legislative Branch. In its opinion, the court refused to grant relief under the "Guarantee Clause" of Article IV, § 4 of the United States Constitution, which promises that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," because it deemed Guarantee Clause challenges to be nonjusticiable political questions. The questions presented are:

1) Whether Guarantee Clause claims are judicially cognizable?

2) Whether a state judiciary's intrusion into the impeachment process represents so grave a violation of the doctrine of separation of powers as to undermine the essential components of a republican form of government?

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PETITION FOR A WRIT OF CERTIORARI

Mitch Carmichael, President of the West Virginia Senate, Donna J. Boley, President Pro Tempore, Tom Takubo, Senate Majority Leader,[1] Lee Cassis, Clerk of the Senate, and the West Virginia Senate (collectively, "the Senate") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court of Appeals (App. 1a-100a) is reported at 241 W. Va. 105, 819 S.E.2d 251. The order of the Supreme Court of Appeals refusing to docket or consider the Senate's petition for rehearing (App. 101a-02a) is unreported. As this action was brought pursuant to the original jurisdiction of the Supreme Court of Appeals, see W. Va. Const. art. VIII, § 3; W. Va. Code § 51-1-3, there is no lower court decision.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered on October 11, 2018. The Senate filed a timely petition for rehearing, which the Supreme Court of Appeals refused to docket. App. 102a. By

[1] Pursuant to Rule 35, the current Senate Majority Leader has been substituted for his predecessor, Ryan Ferns, who was named in the court below as a party in his official capacity.

order entered December 17, 2018, the Chief Justice extended the time for the filing of a petition for a writ of certiorari by 60 days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, § 4 of the United States Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Article IV, § 9 of the West Virginia Constitution provides, in relevant part, that "[a]ny officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence."

STATEMENT

Serious Guarantee Clause challenges should not arise often in a well-functioning Republic. But when they do—as this case makes clear—they involve issues of critical importance that call to be set right.

In the decision below, a temporarily appointed panel of the Supreme Court of Appeals of West Virginia issued a writ of prohibition that halted the impeachment trial of Respondent, then-Chief Justice Margaret Workman. The trial was scheduled before the West Virginia Senate after the West Virginia House of Delegates returned Articles of Impeachment against Respondent and the remaining members of the Supreme Court of Appeals. In bypassing the West Virginia Constitution's explicit grant of the "sole" power of impeachment to the legislature, W. Va. Const. art. IV, § 9, the court flagrantly invaded the province of a co-equal branch of government and largely insulated the judiciary—in this and future cases—from the essential check that impeachment provides in a republican system.

The Senate takes no position on whether Respondent should be removed from office, nor does it ask the Court to correct most of the procedural and legal errors in the decision below—which are legion, but sound primarily in state law. Rather, this Court should intervene to resolve the narrow, but critically important, question whether the acting justices' decision undermines the republican form of government that the federal Constitution guarantees to every State. Far from merely policing the boundaries of the impeachment process, the court

below decided for itself the *merits* of some of the Articles of Impeachment, then declared that the legislature can *never* use conduct regulated by West Virginia's Code of Judicial Conduct as grounds for impeachment. This decision renders impeachment's promise of accountability hollow by setting the judiciary up as its own judge, and impermissibly upsets the balance of powers between what should and must be co-equal branches.

Nevertheless, the court refused to consider the implications of its extreme position under the Guarantee Clause, relying instead on precedent from this Court to find the claim nonjusticiable. This outcome reflects significant confusion in federal and state courts over whether the Guarantee Clause is judicially enforceable, and, if so, whether serious separation-of-powers violations warrant relief. The Court should make clear that in extreme cases like this one, the judiciary has the power to intervene.

1. In November 2017, a local news station aired an investigative report into a pattern of expenditures by the West Virginia Supreme Court of Appeals.[2] This and other reports focused on the high cost of renovations of the justices' private offices. App. 9a. In early 2018, state officials began investigating these and other allegations against various members of the

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[2] Kennie Bass, *Waste Watch Exclusive Investigation: WV Supreme Court spending examined*, WCHS Eyewitness News (Nov. 14, 2017), https://wchstv.com/news/waste-watch/waste-watch-investigation-wv-supreme-court-spending-examined.

court. On February 5, 2018, a resolution was introduced in the House of Delegates seeking to authorize a legislative investigation into the behavior of then-Chief Justice Allen Loughry, specifically.[3] Around the same time, West Virginia's Judicial Investigation Commission began its own investigation of Loughry that led to a report charging 32 violations of West Virginia's Code of Judicial Conduct.[4] Loughry was suspended by the other members of the Supreme Court of Appeals after this report was issued, and was eventually convicted of federal wire fraud.[5]

In April 2018, West Virginia's Legislative Auditor issued a report regarding Supreme Court of Appeals spending practices that focused primarily on Loughry and then-Justice Menis Ketchum. App. 10a. The Legislative Auditor issued a second report in May 2018 revealing numerous instances of misuse of state vehicles and funds for these justices' personal use.[6] In

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[3] House Res. 4 (2018), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=hr4%20intr.htm&yr=2018&sesstype=rs&i=4&houseorig=h&billtype=r.

[4] See *Justice Loughry is named in 32-count judicial complaint saying he lied over and over*, WAJR.com (June 6, 2018), https://wajr.com/justice-loughry-is-named-in-32-count-judicial-complaint-saying-he-lied-over-and-over/.

[5] Lacie Pierson, *WV Supreme Court Justice Loughry guilty on 11 of 22 federal charges*, Charleston Gazette-Mail (Oct. 12, 2018), https://www.wvgazettemail.com/news/cops_and_courts/wv-supreme-court-justice-loughry-guilty-on-of-federal-charges/article_dd705b7d-dc3b-5cfb-9edd-a2257d584deb.html.

[6] Joint Committee on Government & Finance, West Virginia Office of the Legislative Auditor, Legislative Audit Report:

June, the Legislative Auditor issued a final report focusing more broadly on $29 million in Supreme Court of Appeals spending between Fiscal Years 2012 and 2016.[7]

2. On June 22, 2018, leaders in both houses of the legislature issued a letter directing the Joint Judiciary Committee to consider possible impeachment proceedings.[8] On June 25, 2018, Governor Jim Justice issued a proclamation calling the legislature into a special session to consider the impeachment and removal of "one or more Justices of the Supreme Court of Appeals of West Virginia." App. 10a. The next day the House of Delegates unanimously approved a resolution authorizing its judiciary committee to conduct an investigation of all five justices. App. 11a.

Justice Ketchum resigned from the court on July 11, 2018, App. 11a n.6, and eventually pleaded guilty

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Supreme Court of Appeals of West Virginia Report 2, http://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA_2018_637.pdf.

[7] Joint Committee on Government & Finance, West Virginia Office of the Legislative Auditor, Legislative Audit Report: Supreme Court of Appeals of West Virginia Re-Appropriated Fund Balance Analysis, http://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA_2018_642.pdf.

[8] See Lacie Pierson, *Legislators to consider impeaching WV Justice*, Huntington Herald-Dispatch (June 26, 2018), https://www.herald-dispatch.com/news/legislators-to-consider-impeaching-wv-justice/article_82fef264-66e2-5534-8f8e-567c89880fbf.html.

to one count of federal wire fraud.[9] The House Committee began potential impeachment hearings focused on the remaining four justices the next day. App. 11a & n.6.

After over three weeks of hearings, the judiciary committee adopted 14 Articles of Impeachment that, collectively, related to all four remaining justices. App. 11a-12a, 103a-15a. On August 13, 2018, the House of Delegates voted to impeach the justices on 11 of those Articles. App. 12a, 115a. Justice Robin Davis announced her resignation the next day, with an effective date of August 13. App. 12a n.8.

As most relevant here, Respondent was named in 3 of the 11 adopted Articles. App. 12a. The first, Article IV, which named Respondent and Justice Davis, alleged that they "overpay[ed] certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges." App. 105a. Respondent was named individually in Article VI, which also concerned improper payments to senior-status judges. App. 107a-08a. Both Articles further alleged that authorizing the overpayments violated several sections of the West Virginia Code criminalizing fraud and obtaining property by false pretenses. App. 105a-06a, 108a. And both alleged that "all of the [acts referenced] above are in violation

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[9] John Raby, *Former WV Supreme Court Justice Ketchum pleads guilty*, Huntington Herald-Dispatch (Aug. 24, 2018), https://www.herald-dispatch.com/news/former-wv-supreme-court-justice-ketchum-pleads-guilty/article_4c43d947-2b6a-54ba-864f-364c70cd0c06.html.

of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct." App. 106a, 108a.

The third Article involving Respondent—Article XIV—named all four of the remaining justices. It alleged "waste [of] state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending." App. 113a. Article XIV also called out alleged failures to adopt policies and provide effective supervision and control over the use of state property and resources. App. 112a-13a. The Article concluded that "[t]he failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute[s] a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct." App. 114a-15a.

The Senate convened as a Court of Impeachment in September 2018. It adopted a resolution establishing procedural rules, conducted a pre-trial conference, and set separate trial dates for the justices over the following weeks. App. 12a-13a.

At the first trial, the Senate voted 32-1 to acquit Justice Elizabeth Walker of the single Article of Impeachment returned against her.[10] Justice Davis then filed an action in federal district court seeking an injunction to halt the proceedings before her trial began. *Davis* v. *Justice*, No. 2:18-cv-01316 (S.D. W.

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[10] Brad McElhinny, *Senators acquit Justice Walker on impeachment charge*, WVMetronews (Oct. 2, 2018), http://wvmetronews.com/2018/10/02/senators-acquit-justice-walker-on-impeachment-charge/.

Va. 2018). In the wake of the decision below, Justice Davis voluntarily dismissed that lawsuit. *Id.* at ECF Nos. 141 & 142.

3. On September 21, 2018, three weeks before her scheduled trial, Respondent filed a Petition for a Writ of Mandamus under the original jurisdiction of the court below, claiming that the impeachment proceedings violated the West Virginia Constitution. App. 13a. Respondent's challenges concerned the substance of the Articles and the procedures the House of Delegates used to adopt them; nevertheless, neither the House nor any of its members were named as parties.

The same day she filed the petition, Respondent issued an administrative order appointing former-Justice Thomas McHugh—who had previously served with Respondent on the Supreme Court of Appeals—as Acting Chief Justice. The administrative order directed him to select a different "Acting Chief Justice to preside over this proceeding," who would, in turn, "appoint four other acting justices to preside with him."[11] Respondent recused herself from the case the same day, as did the remaining two justices, Justice Walker and Acting Justice Paul Farrell (who had

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[11] Administrative Order, Supreme Court of Appeals of West Virginia (Sept. 21, 2018), https://www.documentcloud.org/documents/4917574-McHugh-Assignment-Workman-Petition.html.

temporarily been appointed to replace suspended Justice Loughry).[12]

Also that same day, Acting Chief Justice McHugh issued an administrative order appointing Harrison County Circuit Judge James Matish as Acting Chief Justice for purposes of this matter.[13] Three days later Acting Chief Justice Matish named four other circuit judges to fill out the remainder of the acting court. The Senate sought disqualification of one of these acting justices who had been involved in the Judicial Investigation Commission's investigation of Chief Justice Loughry's conduct earlier in 2018. App. 141a-42a. The court apparently denied this motion, as the judge in question joined in the court's decision, but the court did not issue any order responding to the disqualification motion.

4. On October 11, 2018, after an expedited briefing schedule and without holding oral argument, the court construed Respondent's request for mandamus as a writ of prohibition, and granted the request. This decision effectively halted the Senate's impeachment proceedings for all of the remaining justices.

The panel acknowledged that it is "clear from the text" of the West Virginia Constitution that the court has no "jurisdiction over an appeal of a final decision

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[12] *Id.*

[13] Administrative Order 2, Supreme Court of Appeals of West Virginia (Sept. 21, 2018), https://www.documentcloud.org/documents/4918095-Matish-Appointment-Order-Workman-Petition.html.

by the Court of Impeachment." App. 18a. Yet despite this inability to review or otherwise second-guess the Senate's final decision after an impeachment trial, the court adopted a novel reading of the "Law and Evidence Clause" of the West Virginia Constitution to find that it possessed implicit power to stop these proceedings from occurring in the first place. App. 18a-19a; see also W. Va. Const. art. IV, § 9.

Because the West Virginia Constitution, similar to its federal counterpart, commits the power of impeachment solely to the legislative branch, W. Va. Const. art. IV, § 9, the Senate argued that judicial interference with this purely legislative function would imperil the separation of powers essential to a republican form of government, and thereby violate Article IV, § 4 of the federal Constitution. The court disposed of this argument in a footnote. App. 37a n.22. The court found "no merit in this contention," and relied on this Court's statement that in most Guarantee Clause cases, "the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *Id.* (quoting *New York* v. *United States*, 505 U.S. 144, 184 (1992)).

Having announced its power to intervene in the impeachment proceedings—and finding that the Guarantee Clause concerns the Senate raised were nonjusticiable—the court next addressed the substance of each Article of Impeachment against Respondent. Despite citing no authority allowing the courts to define "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor," W. Va. Const. art.

IV, § 9, the court took the unprecedented step of policing what behavior could rise to the level of "wrongful impeachable conduct." App. 69a n.32. As to Articles IV and VI, the court inserted its own judgment that the allegations of overpaying senior-status judges were legally unsubstantiated. The court reasoned that allowing payments in excess of statutory limits was not unlawful because the Chief Justice had authorized the payments through a superseding administrative order. App. 66a-74a. And because, in the court's view, Respondent "did not overpay any senior-status judge as alleged in Article IV and Article VI," the court deemed the allegations legally insufficient and "prohibited" the Senate "from further prosecution of [Respondent] under those Articles." App. 74a.

The court declared Article XIV invalid as well. App. 81a-82a. That Article was predicated on "alleged violations of the West Virginia Code of Judicial Conduct," and the court claimed "exclusive constitutional jurisdiction" over conduct described in the Code. App. 74a, 77a. Appropriating separation-of-powers principles for itself, the court reasoned that its inherent authority to enforce the Code in disciplinary actions against judges divested the legislature of its constitutional power to consider charges related to the *same* misconduct in an impeachment proceeding. App. 80a-82a.

Next, the court went out of its way to address Respondent's remaining arguments—which it admitted were "technically moot"—concerning the House of Delegates' impeachment proceedings

themselves. App. 82a-83a. Expressing "grave[] concern[]" with the process the House had used, the court concluded that the House failed to comply with its internal procedures "requir[ing] the Judiciary Committee to set out findings of fact." App. 85a, 89a. The acting justices therefore held that "[f]ailure to follow such rules will invalidate all Articles of Impeachment that [the House] returns against a public officer." App. 89a. The court also imported principles from criminal law into its discussion: Reasoning that just as an indictment must "allege the essential elements of wrongful conduct," Respondent "was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to" corruption, maladministration, or any of the other bases for impeachment the West Virginia Constitution sets forth.

Finally, the court directed the Clerk "to issue the mandate contemporaneously" with its decision. App. 90a.

5. Acting Justices Bloom and Reger issued a joint partial concurrence, partial dissent. App. 91a-100a. They agreed with the majority that the challenged Articles of Impeachment were constitutionally invalid, but wrote separately to emphasize that the majority's decision to address purported procedural flaws exceeded the judiciary's "limited role" in the impeachment context. App. 95a. They explained that because the West Virginia Constitution "invests absolute authority in the Legislature to bring impeachment charges against a public officer and to

prosecute those charges," judicial intervention must be cabined to the "extremely rare" cases where "an impeachment charge is prohibited by the Constitution." App. 92a-93a. They further objected to the court's decision not to conduct oral argument, both because it deprived the court of "the opportunity for a more thoughtful discussion with the parties and perhaps greater illumination of the issues," and because of the heightened importance of judicial transparency in "a case both constitutionally and politically charged." App. 91a n.1.

6. On October 25, 2018, the House of Delegates filed a motion to intervene in the Supreme Court of Appeals. Pet. for a Writ of Certiorari 231a, *W. Va. House of Delegates* v. *State of West Virginia ex rel. Margaret L. Workman, et al.*, No. 18-893 (U.S.).[14] The House argued that it was entitled to intervene and file a motion for rehearing because the court's decision invalidated the House's actions in adopting the Articles of Impeachment, even though the House had never been named as a party and did not participate below. The court, however, refused to act on the motion. *Id.* at 95a.

On November 5, 2018, the Senate filed a timely petition for rehearing urging the acting justices to grant rehearing, including argument and additional briefing. App. 116a-44a. Together with numerous

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[14] The House filed a separate petition for a writ of certiorari from the same Supreme Court of Appeals decision at issue here. See *Workman*, No. 18-893 (U.S. pet. filed Jan. 8, 2018). That petition remains pending.

state-law claims, the petition argued that failure to include the House as an indispensable party violated separation of powers, and that refusal to act on the Senate's disqualification motion violated the Senate's federal due-process rights. App. 132a-33a, 141a-42a. The petition also argued that the court dismissed the Guarantee Clause claim too quickly, App. 142a-43a; unlike in the decision the court cited in its footnote brushing that argument aside, here the court's actions posed a "realistic risk of altering the form or the method of functioning of [West Virginia's] government." App. 143a (quoting *New York*, 505 U.S. at 185-86).

The court below refused to docket or otherwise consider the petition for rehearing. App. 102a. It explained that it lacked jurisdiction because it had caused the mandate to be issued simultaneously with its opinion. *Id.* The West Virginia Rules of Appellate Procedure permit early issuance of the mandate, but also provide that in such cases the court "shall set forth by order the deadline for filing" any petition for rehearing. W. Va. R. App. Proc. 25(a). The court did not, however, issue any order shortening the rehearing deadline.

On December 17, 2018, the Chief Justice extended the timeframe to file this Petition by 60 days. This Petition followed.

REASONS FOR GRANTING THE PETITION

The Guarantee Clause in Article IV, § 4 of the U.S. Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican

Form of Government." U.S. Const. art. IV, § 4. In addition to the many state-law arguments raised below, the Senate urged the court not to wade into an area textually committed to the state legislature, because judicial interference with the impeachment power would lead to a separation-of-powers failure. Undermining the vital check on the judiciary that impeachment provides threatens a State's system of separate and co-equal branches of government—and at the severe level evident here, impermissibly frustrates Article IV, § 4's guarantee.

Nevertheless, the Supreme Court of Appeals rejected this argument in one footnote. Speaking narrowly to the case's specific procedural posture, the court noted first that the Senate did not "cite[] to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause." App. 37a n.22. The court then refused to engage the merits of the Guarantee Clause claim more generally, relying instead on this Court's acknowledgment that "[i]n most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *Id.* (quoting *New York* v. *United States*, 505 U.S. 144, 184 (1992)).

This summary rejection of the Guarantee Clause argument was wrong—and the latest in a recurring pattern of similar judicial errors. Four federal courts of appeals have adopted categorical rules deeming Guarantee Clause claims nonjusticiable. Two others have held that such claims are cognizable, at least in

certain circumstances, and at least one more has recognized the uncertain state of the law in this important sphere. Review is needed to resolve whether the judiciary has any role to play when Article IV, § 4's guarantee is in the crosshairs. Further, only this Court can resolve what sort of failures are critical enough to constitute a breakdown of republicanism. As disagreement among state courts of last resort makes clear, it remains an open question whether separation-of-powers violations can be sufficient. Finally, the unusually egregious degree of judicial overreach in the decision below—which purported to reshape the balance of powers between West Virginia's judicial and legislative branches—warrants this Court's review.

I. THE DECISION BELOW IMPLICATES A CIRCUIT COURT CONFLICT OVER THE JUSTICIABILITY OF GUARANTEE CLAUSE CLAIMS.

Claims under Article IV, § 4 seldom see judicial resolution, in part because of the absolutist language in some of this Court's decisions. See, *e.g.*, *Marshall* v. *Dye*, 231 U.S. 250, 256 (1913) (deeming "consideration of [a Guarantee Clause] question unnecessary" because it "presents no justiciable controversy"). Indeed, the decision below follows the path of at least four circuit courts that have held the Guarantee Clause is not judicially enforceable. The Court should intervene to make clear Article IV, § 4 is more than an ephemeral guarantee.

A. The court below dismissed the Guarantee Clause claim based on this Court's decision in *New*

York v. *United States*. App. 37a n.22. *New York*, in turn, traces the origin of the idea that the Guarantee Clause "implicates only nonjusticiable political questions" to *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849). *New York*, 505 U.S. at 184. Properly understood, *Luther*'s holding is essentially a "limited one," but it has taken on a life of its own: Over the century after it was decided it "metamorphosed into [a] sweeping assertion" against justiciability of all Guarantee Clause claims. *Id.* In fact, the very dispatch with which the Supreme Court of Appeals addressed Petitioners' federal constitutional argument illustrates the power of *Luther*'s legacy—and the need for this Court to clarify its true limits.

Brought as a trespass action, *Luther*'s larger backdrop is the unique path Rhode Island took toward adopting its state constitution. Unlike nearly all of the other colonies, Rhode Island did not establish a new constitution after the Revolutionary War; instead, it continued to rely on its 1663 colonial charter. See *Luther*, 48 U.S. at 35. By the early 1840s, frustration with various aspects of the charter fueled competing movements to replace it with a new constitution. *Id.* at 48-49. One faction, led by Thomas Dorr, called a convention, fashioned a constitution, and organized a vote in which a majority of Rhode Islanders approved the "People's Constitution." *Id.*; see generally Arthur May Mowry, *The Dorr War: Or, The Constitutional Struggle in Rhode Island* (Preston & Rounds 1901). The existing charter government sponsored a rival constitutional convention, declared martial law, and ultimately suppressed a Dorr-led

uprising. *Luther*, 48 U.S. at 37; see also Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 775 (1994). The charter government then called another constitutional convention, and the State voted again to approve the constitution *it* produced. See Mowry, at 241.

In the wake of this constitutional turmoil, the question in *Luther* depended on "which of [the] two rival governments was the legitimate government of Rhode Island." *New York*, 505 U.S. at 184; see also *Luther*, 48 U.S. at 33. This Court refused to insert itself into that question. The consequences would have resonated far beyond a single trespass case: It would have potentially unsettled *every* action the charter government took for seven years after the vote on Dorr's constitution. Particularly where judicial action carries such weight, the Court "examine[s] very carefully its own powers before it undertakes to exercise jurisdiction." *Luther*, 48 U.S. at 39. The Court further reasoned that "the political department has always determined whether [a] proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." *Id.* It also deemed the question akin to recognizing the legitimacy of a sovereign in international relations. *Id.* And that question unquestionably "is not a judicial, but is a political question." *Jones* v. *United States*, 137 U.S. 202, 212 (1890); see also *Baker* v. *Carr*, 369 U.S. 186, 212 (1962).

While resolved on justiciability grounds, *Luther* thus does not stand for the absolute nonjusticiability of the Guarantee Clause. Critically, *both* of the rival Rhode Island governments "met minimal conditions of democratic legitimacy," which made both regimes "arguably Republican 'enough,' even if one was 'more' Republican." Amar, 65 U. Colo. L. Rev. at 776. In other words, while *Luther* held that questions about the legitimacy of a particular regime are nonjusticiable, it does not necessarily follow that questions about the *character* of that government are, too. See, *e.g.*, *Baker*, 369 U.S. at 223 (characterizing *Luther* as holding only that "the Guarant[ee] Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government").

Consistent with *Luther*'s narrow holding, this Court reached the merits of Guarantee Clause claims several times in the following decades. *See New York*, 505 U.S. at 184 (citing *Attorney General of Mich. ex rel. Kies* v. *Lowrey*, 199 U.S. 233 (1905); *Forsyth* v. *Hammond*, 166 U.S. 506 (1897); *Duncan* v. *McCall*, 139 U.S. 449 (1891); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875)). But this clarity did not stick.

In a seminal 1912 decision, the Court refused to resolve a Guarantee Clause case challenging an amendment to the Oregon Constitution that established initiative and referendum in the State. *Pac. States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118 (1912). As in *Luther*, this claim had sweeping implications: "if held to be sound," it "would necessarily affect the validity, not only of the

particular statute which is before us, but of every other statute passed in Oregon since the adoption of [the amendment]." *Id.* at 141. In those circumstances the Court affirmed "the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists." *Id.* at 150. Yet in the same line, the Court also emphasized its "ever-present duty . . . in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution." *Id.* "[E]ssentially political" attacks demanding that a State "establish its right to exist" thus belong to the political branches, but the Court left open the fate of claims brought "for the purpose of testing judicially some exercise of power." *Id.* at 150-51.

Caveats notwithstanding, the next half century saw a shift toward rejection of Guarantee Clause claims. A year after *Pacific States* the Court brusquely rejected a Guarantee Clause claim in *Marshall*, 231 U.S. at 256-57. Two years later it characterized an "attempt to invoke § 4 of article 4 of the Federal Constitution" as "obviously futile." *O'Neill* v. *Leamer*, 239 U.S. 244, 248 (1915). Later cases continued the pattern, until it became axiomatic—almost—that Guarantee Clause claims present nonjusticiable political questions. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (including "maintenance of a republican form of government" in a list of "matters [that] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Colegrove* v. *Green*, 328 U.S.

549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.").

The Court's 1962 decision in *Baker* v. *Carr* changed the game again. There, the Court outlined factors that bear on whether a claim falls within the political question doctrine's narrow exception to jurisdiction. *Baker*, 369 U.S. at 210-17. Discussing its prior Guarantee Clause cases specifically, the Court explained that it had declined to exercise jurisdiction because those cases involved political questions, and the claims in them were nonjusticiable "for that reason *and no other*." *Id.* at 218 (emphasis added). As to *Pacific States*, for example, it was irrelevant that the parties' arguments "happened to be joined with a Guarant[ee] Clause claim" or related to "subject matter which might conceivably have been dealt with through the Guarant[ee] Clause"; the real concern was that the Clause was "invoked merely in verbal aid of the resolution of issues which, in [the Court's] view, entailed political questions." *Id.* at 228. The Court reinforced this more nuanced approach two years later in *Reynolds* v. *Simms*, which stated that only "*some* questions raised under the Guarant[ee] Clause are nonjusticiable,"—those that are "political" in nature and lack "judicially manageable standards." 377 U.S. 533, 582 (1964) (emphasis added).

B. From *Luther* to *Baker* and *Reynolds*, it should thus be clear that courts can and must resolve at least some Guarantee Clause claims. Federal courts, after all, "should be loath to read out of the Constitution as judicially nonenforceable a provision that the

Founding Fathers considered essential to formulation of a workable federalism." *Kohler* v. *Tugwell*, 292 F. Supp. 978, 985 (E.D. La. 1968) (Wisdom, C.J., concurring). Nevertheless, the circuitous history of this doctrine—and the strong language the Court has used at times when disclaiming jurisdiction—has caused considerable confusion.

On the one hand, four federal courts of appeals have held, like the Supreme Court of Appeals, that Guarantee Clause claims are never justiciable:

Fifth Circuit. In *O'Hair* v. *White*, 675 F.2d 680 (5th Cir. 1982), the Fifth Circuit faced a challenge to a provision in the Texas Constitution providing that no person shall "be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being." *Id.* at 683. The court refused to address a claim that this provision violated the Guarantee Clause because it was "tantamount to the creation of a theocratic state." *Id.* at 684 n.5. Instead, relying on both *Luther* and *Pacific States*, the court summarily declared that "suits arising under the guarantee clause clearly present nonjusticiable political questions." *Id.*

Sixth Circuit. The Sixth Circuit is similarly dismissive of Guarantee Clause claims. *Phillips* v. *Snyder*, 836 F.3d 707 (6th Cir. 2016) concerned a Michigan statute that granted the governor authority to appoint an emergency manager to oversee the finances—and in practical effect, all day-to-day operations—of municipalities and public school systems deemed to be in financial distress. Relying on *Luther* and *Pacific States*, the court concluded that

this Court has "traditionally" "held that claims brought under the Guarantee Clause are nonjusticiable political questions." *Id.* at 716-17 (citations omitted). It is instead "up to the political branches of the federal government to determine whether a state has met its federal constitutional obligation to maintain a republican form of government"—and the absolute nature of that rule "disposes of [the] plaintiffs' Guarantee Clause claim." *Id.* at 717.

Seventh Circuit. Similarly, in *Risser* v. *Thompson*, 930 F.2d 549 (7th Cir. 1991), the Seventh Circuit declined to exercise jurisdiction over a challenge to the "partial veto" authority that the Wisconsin Constitution entrusts to the State's governor. This supercharged form of a line-item veto allows the governor to go beyond approving or disproving appropriations legislation, to effectively amending it. *Id.* at 550. Yet despite concerns about executive power bleeding into the core province of the legislature, the court insisted that "[t]he clause guaranteeing to each state a republican form of government has been held not to be justiciable." *Id.* at 552.

Ninth Circuit. Finally, the Ninth Circuit has declared the Clause nonjusticiable on at least two occasions. First, in *California* v. *United States*, 104 F.3d 1086 (9th Cir. 1997), the court rejected a "defensive" Guarantee Clause claim. California argued that the federal government's failure to stem the flow of illegal immigration had "forced it to spend money that it would otherwise not have been required

to spend, thus depriving it of a republican form of government." *Id.* at 1091. The Ninth Circuit, however, held that this claim involved "nonjusticiable political questions," because this Court's decisions "have traditionally found that claims brought under the Guarantee Clause are nonjusticiable." *Id.* (citing *New York*, 505 U.S. at 183-85); see also *Texas* v. *United States*, 106 F.3d 661, 666 (5th Cir. 1997) (deeming similar claims by Texas nonjusticiable); *Chiles* v. *United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (holding same for claims by Florida).

Second, the court also rejected a Guarantee Clause challenge to an initiative that restored the death penalty in California. *Murtishaw* v. *Woodford*, 255 F.3d 926, 961 (9th Cir. 2001). That rejection was summary and definitive: Relying on *New York* and *Pacific States*, the Ninth Circuit declared that "[a] challenge based on the Guarantee Clause . . . is a nonjusticiable political question." *Id.*

On the other hand, two federal appellate courts have emphasized that there is no absolute bar to considering Guarantee Clause claims. Rather, these claims are cognizable in appropriate circumstances.

Fourth Circuit. In *Kerpen* v. *Metropolitan Washington Airports Authority*, 907 F.3d 152 (4th Cir. 2018), the Fourth Circuit addressed a challenge to how an airport authority used proceeds from certain toll roads. A class of citizens argued that the authority exercised governmental power without accountability to those who bore the financial brunt of its decision-making, and thus that its existence undermined principles of republicanism. See Opening

Br. of Appellant, *Kerpen*, 2018 WL 1312840, at *42-45. The Fourth Circuit began its analysis on familiar ground, relying on *New York* for the principle that, "[f]or the most part, claims premised on the Guarantee Clause present nonjusticiable 'political questions,' unfit for resolution within the judicial branch." *Kerpen*, 907 F.3d at 163 (citing *New York*, 505 U.S. at 184). And ultimately, the court recognized that "[t]he question of whether a claim is justiciable is a 'difficult' one," and declined to exercise jurisdiction over the specific claim before it. *Id.* Importantly, however, the court cabined its holding in a way the Fifth, Sixth, Seventh, and Ninth Circuits have not: emphasizing that "'not all' claims under the Guarantee Clause are nonjusticiable," and leaving the door open to address the merits of a Guarantee Clause claim in appropriate circumstances. *Id.* (quoting *New York*, 505 U.S. at 185).

Tenth Circuit. The Tenth Circuit took the step the Fourth Circuit reserved for another day, holding in *Kerr* v. *Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), that "the specific Guarantee Clause claim asserted in this case is not barred by the political question doctrine." *Id.* at 1181. *Kerr* involved a challenge to a provision of the Colorado Constitution that had been adopted by voter initiative. *Id.* at 1161. The court addressed directly the "threshold matter" whether "the political question doctrine categorically precludes Guarantee Clause challenges against state constitutional amendments adopted by popular vote." *Id.* at 1173. Despite "support for th[at] position in Supreme Court cases predating the modern

articulation of the political question doctrine," the court held that it does not. *Id.* It distinguished both *Luther* and *Pacific States*, explaining that they "involved wholesale attacks on the validity of a state's government," and "reject[ed] the proposition that [they] brand all Guarantee Clause claims as per se non-justiciable." *Id.* at 1173, 1176. It then explained that the political-question framework *Baker* outlined guides the modern doctrine—and under that standard, held the claim justiciable. See *id.* at 1176-81.[15]

Finally, although the Second Circuit has previously characterized this Court's precedents as holding "that claims brought under the Guarantee Clause are nonjusticiable political questions," *Padavan* v. *United States*, 82 F.3d 23, 28 (2d Cir. 1996), it appears to be trending toward the Fourth and Tenth Circuit's more nuanced position. See *Anti-Discrimination Ctr. of Metro New York* v. *Westchester Cty.*, 712 F.3d 761, 774 (2d Cir. 2013) ("perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

Only this Court can resolve the tension among lower courts over the justiciability of Guarantee

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[15] This Court ultimately vacated and remanded *Kerr* in light of *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2666-69 (2015). See *Hickenlooper* v. *Kerr*, 135 S. Ct. 2927 (2015). That decision, however, was premised on the federal Constitution's Elections Clause, not the Guarantee Clause.

Clause claims. The Seventh Circuit lamented its conclusion that Guarantee Clause claims are nonjusticiable even as it wrote it, explaining that this harsh rule has been "powerfully criticized." *Risser*, 930 F.2d at 552. Nevertheless, the court read *Pacific States* as controlling, and explained that a categorical nonjusticiability rule is "too well entrenched to be overturned at our level of the judiciary." *Id.* Similarly, although as discussed above the Sixth Circuit has hewed to an absolutist position, dissenting judges on that court have urged this Court to intervene for over a decade. See *Kidwell* v. *City of Union*, 462 F.3d 620, 636 n.5 (6th Cir. 2006) (Martin, J. dissenting) (asking the Court "to reconsider its Guarantee Clause jurisprudence"). Or in the words of the Fifth Circuit, "[s]omeday, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guarant[ee] Clause." *Byrd* v. *City of San Antonio*, 587 F.2d 184, 186 (5th Cir. 1979). This Court should intervene to make clear that day is here, and those appropriate circumstances do exist.

II. REVIEW IS NECESSARY TO RESOLVE WHETHER THE SEPARATION OF POWERS IS AN ESSENTIAL COMPONENT OF THE REPUBLICAN FORM OF GOVERNMENT.

Assuming that Guarantee Clause claims are not per se nonjusticiable, the natural question that comes next is equally important: What circumstances pose a great enough danger to republicanism to warrant relief? Or in other words, what are the essential components of a republican form of government? This

case is an ideal vehicle to provide guidance on this question as well.

The court below purported to ground its intrusion into the legislature's realm in state law, primarily in the "Law and Evidence Clause" of the state Constitution. App. 18a-19a; see also W. Va. Const. art. IV, § 9 (in impeachment proceedings, "senators shall be on oath or affirmation, to do justice according to law and evidence"). This interpretation of West Virginia law is profoundly incorrect.[16] Nevertheless, even assuming that West Virginia's Constitution does allow the judicial overreach evident here, this case asks whether such an outcome can be reconciled with the promise of republican governance that the *federal* Constitution ensures. And central to that question is whether a significant breakdown of the separation of

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[16] Article IV, § 9 of the West Virginia Constitution is patterned in large part on the federal Constitution, and impeachment in the federal system is indisputably a legislative function. See, *e.g.*, *Nixon* v. *United States*, 506 U.S. 224 (1993). To be sure, while both regimes place senators "on oath or affirmation" when trying impeachments, cf. U.S. Const. art. I, § 3, cl. 6, with W. Va. Const. art. IV, § 9, only West Virginia requires senators "to do justice according to law and evidence." Yet this additional clause simply defines the content of a senator's oath; it does not provide grounds for judicial intervention into the merits of impeachment or the procedures the legislature employs. Cf. *Mecham* v. *Ariz. House of Representatives*, 782 P.2d 1160, 1161 (Ariz. 1989) (rejecting argument that Arizona's law and evidence clause creates "jurisdiction to review the proceedings in the legislature"). And it is an even greater stretch to conclude that a provision describing state *senators'* duties confers power on the courts to veto what took place on the *House's* side of the chamber.

powers can ever rend the republican fabric of a State's political regime.

On some level, the idea that separation of powers is interwoven with the essence of the republican form of government is noncontroversial. See, *e.g.*, Jacob M. Heller, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 Stan. L. Rev. 1711, 1718-20 (2010) (explaining that while "sketching out its exact contours has proven elusive," "a separation of powers among coequal branches of government" is a "core characteristic of republican governance"). The Founders viewed the three-branch system they fashioned as a republic, after all, and as James Madison wrote in Federalist No. 47, "the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 322 (Van Doren ed., 1945). Or as Thomas Jefferson put it, the "leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other."[17]

The link between separation of powers and republicanism is embedded deeply in this Court's precedents, too. The separate and "consequent exclusive character of the powers conferred upon each of the three departments *is basic and vital*—not merely a matter of governmental mechanism." *Springer* v. *Gov't of Philippine Islands*, 277 U.S. 189,

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[17] Letter from Thomas Jefferson to George Hay Washington (June 20, 1807), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl180.php.

201 (1928) (emphasis added). Separation of powers is "*one of the chief merits* of the American system of written constitutional law," and it is "essential to the successful working of this system" that the "branches shall not be permitted to encroach upon the powers confided to the others." *Kilburn* v. *Thompson*, 103 U.S. 168, 190-91 (1880) (emphasis added).

Nevertheless, while easily stated in the abstract, applying these principles in the Guarantee Clause context has proven troublesome. Take the example of two other state courts of last resort:

In *VanSickle* v. *Shanahan*, 511 P.2d 223 (1973), the Kansas Supreme Court considered a Guarantee Clause challenge surrounding the adoption of a state constitutional amendment that altered key components of the executive branch. The court held that "separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States." *Id.* at syl. pt. 4, 511 P.2d at 226. The court's decision flowed from a lengthy review of the historical record, including examination of Madison's notes on the debates at the Constitutional Convention regarding the proposals that ultimately became the Guarantee Clause, and subsequent discussion of the separation-of-powers doctrine in the Federalist Papers. These sources led the court to conclude that "the doctrine of separation of powers is an inherent and integral element of the republican form of government," and that, together, both concepts comprise "the underlying assumption

upon which the framework of the new government was developed." *Id.* at 241.

Analyzing the same historical record, however, led the Supreme Court of Colorado to the opposite result. While emphasizing that "the separation of powers concept is extremely important, and fundamental to our free system of government," the court reasoned that "one would be hard pressed to conclude that the separation of powers doctrine and the concept of republicanism are inextricably united." *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 189 Colo. 1, 13 536 P.2d 308, 318 (1975). A year later the court doubled down on this approach, explaining again that "the Constitution of the United States does not, by its guarantee of the republican form of government, guarantee the doctrine of separation of powers to the states." *City of Thornton* v. *Horan*, 192 Colo. 144, 148, 556 P.2d 1217, 1220 (1976).

Just as with the threshold question whether the courts can enforce the Guarantee Clause at all, this Court's review is necessary to clarify the scope of the liberties it protects. This case provides an opportunity to reinforce the vitality of separation of powers to our republican form of government—on the federal *and* state levels.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND CONCERN THE CORE OF THE REPUBLICAN FORM OF GOVERNMENT GUARANTEE.

This is the rare case calling for the "powerful sword" of the Guarantee Clause in order "to restore republican government in states that have deviated from that principle." Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 819-20 (1994). Review is warranted because of the particular importance that separation of powers plays in the impeachment context, and because this case is an especially flagrant example of judicial overreach at the expense of political and structural accountability.

First, breakdowns in the impeachment process carry deep consequences for republicanism. Both the federal and West Virginia Constitutions textually commit the "sole power" of impeachment to the legislature. U.S. Const. art. I, § 2, cl. 5; art. I. § 3, cl. 6; W. Va. Const. art. IV, § 9. And "the word 'sole' is of considerable significance." *Nixon* v. *United States*, 506 U.S. 224, 231 (1993); see also *In re Watkins*, 233 W. Va. 170, 174, 757 S.E.2d 594, 598 (2013) ("[u]nder our Constitution, only the Legislature has the power to remove a . . . judge from office"). Indeed, even accounting for drafting differences, the view that impeachment is a quintessentially legislative function prevails among state high courts, as well. See, *e.g.*, *Horton* v. *McLaughlin,* 821 A.2d 947, 949 (N.H. 2003) ("impeachment is exclusively a legislative

prerogative" (citation omitted)); *Mecham* v. *Gordon,* 751 P.2d 957, 961-62 (Ariz. 1988) ("[r]emovals from office are not acts within the judicial power"); *State* v. *Chambers,* 220 P. 890, 892 (Okla. 1923) ("courts have no jurisdiction over nor power to interfere in cases of impeachment").

The danger of judicial interference with the impeachment power is likewise well-established. "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review . . . would *eviscerate* the 'important constitutional check'" impeachment provides. *Nixon*, 506 U.S. at 235 (emphasis added; citation omitted). As Alexander Hamilton explained in Federalist Nos. 79 and 81, impeachment is "*the* basis for constraining usurpation by judges"—and this "emphatic language would have fallen rather flat" if "candor had compelled [Hamilton] to add that . . . judges themselves would sit in final judgment" over themselves. *Nixon* v. *United States*, 938 F.2d 239, 242 (D.C. Cir. 1991) (citations omitted); see also *Misretta* v. *United States* 488 U.S. 361, 383 (1989) (separation of powers demands that "the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches'" (citation omitted)).

The importance of entrusting impeachment to the legislature—and guarding that process from interference by the judiciary—underscores the need for review under the Guarantee Clause when this process falls apart. There is considerable irony in the refusal of the court below to consider the Guarantee Clause claim as nonjusticiable at the same time it

tossed aside the even graver concerns that animate the political-question doctrine when it comes to impeachment. Indeed, the centrality of impeachment in a system premised on checks and balances means that perhaps "no area of constitutional law needs to be nonjusticiable more than impeachment." Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L.J. 231, 233 (1994). It is a dangerous breed of hubris for a court to stride boldly into an area that text, precedent, and tradition entrust wholly to the legislature, then decline to consider the structural implications of its intrusion on the basis that courts cannot enforce Article IV, § 4's guarantee.

Second, the breadth of judicial overreach here is staggering. The decision below is a blatant violation of separation-of-powers principles, effectively insulating West Virginia's judiciary from its most important check—the impeachment power—in this and cases to come.

The court below paid lip-service to the fact that it lacks authority to review "a final decision by the Court of Impeachment," App. 18a, yet its opinion treats that constitutionally independent, legislative court as an inferior *judicial* tribunal. To be sure, there may be extreme situations where judicial intervention into impeachment proceedings is appropriate, but at most this exception could apply where the legislature plainly violates a textual parameter. See *Nixon*, 506 U.S. at 253-54 (Souter, J., concurring) ("if the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin

toss, . . . judicial interference might be appropriate"). Here, however, the acting justices went well beyond policing the boundaries of the constitutional process. In fact, they did more than even acting (itself impermissibly) as a court of review: They assumed authority to consider the *merits* of the Articles of Impeachment *in the first instance*. Analyzing the facts and relevant state laws, they made a legal determination of innocence—that Respondent "did not overpay any senior-status judge"—then "prohibited" the only body with constitutional authority to remove a judge for misconduct "from further prosecution" under those Articles. App. 74a.

Even worse, the court then declared a broad category of misconduct completely untouchable by the impeachment process in *any* case—that is, conduct the judiciary also enforces through the Code of Judicial Conduct. App. 80a-82a. The West Virginia Constitution provides an expansive list of conduct that can form the basis for impeachment: "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." W. Va. Const. art. IV, § 9. There is no suggestion in the text—nor in that of the broadly analogous federal provisions—that the legislature's impeachment powers are limited to areas the judiciary does not also regulate. After all, the very purpose of impeachment in cases like these is to provide an *outside* check on the judiciary.

Finally, the court below issued this novel and wide-sweeping opinion in the face of numerous due-process and procedural irregularities. The court

refused to address the Senate's request for disqualification of a member who participated in the judicial investigation proceedings that helped form the basis of the House of Delegates' decision to initiate impeachment proceedings—significantly, the same judicial process the court ultimately concluded possessed sole authority to enforce violations of the judicial code. App. 77a, 141a-42a. Under the Fourteenth Amendment, due process requires judicial recusal where a judge has a conflict arising from "participation in an earlier proceeding." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 877, 880 (2009). The court below also did not require the House of Delegates to be joined as an indispensable party and refused its motion to intervene, even though it invalidated the Articles the *House* adopted, and deemed the entire proceedings constitutionally infirm based on the *House's* purported failure to follow its own internal procedures. Finally, the court declined to hold oral argument over the objection of two of the five acting justices, App. 91a n.1, even though its opinion decided the merits of the challenged Articles without the benefit of "well-researched arguments" on those issues. App. 7a n.3.

On this last failing, the court possessed largely one-sided briefing for the issues it chose to decide because, although the Senate argued forcefully that the court lacked jurisdiction to intervene in the proceedings at all, it also explained that it could not take a position on the allegations in any of the Articles because it would be improper to prejudge issues pending before the Court of Impeachment. The court

below called this position "untenable," then applied its own rules to find that issues a party does not brief are deemed waived. App. 7a & n.3. Yet the Senate cannot—and still does not—take a position on the sufficiency of the evidence in an impeachment trial that has not taken place. Placing the Senate in the position of violating its duty not to prejudge the merits of claims pending before the Court of Impeachment on the one hand, or waiving its right to a full and fair hearing in the Supreme Court of Appeals on the other, should have put the court on notice that it—not the Senate—stood on insupportable grounds.

The Guarantee Clause does not require wholesale abandonment of republicanism before intervention is required. The "original understanding of the Clause, as well as the most logical interpretation for how [it] can and should be enforced," recognizes that actions representing "death by a thousand cuts" are equally worthy of concern. Heller, 62 Stan. L. Rev. at 1727-33. Here, the court below infringed one of the most important checks on a coordinate branch of government in our republican system. This Court should grant review to make clear that courts can enforce the Guarantee Clause in cases like these, and to restore the balance of powers in West Virginia that the Constitution guarantees to every State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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